

No. **78-1250**

Supreme Court, U.S.

FILED

FEB 12 1979

MICHAEL RODAK, JR., CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1978

JOHN D. BRAZIL,

Petitioner,

v.

SAMBO'S RESTAURANTS, INC.,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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The Petitioner, John D. Brazil, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, which entered an order on September 11, 1978, affirming the trial court's granting of a dismissal for want of prosecution.

PREFATORY NOTE

This Court is urged to issue a writ of certiorari in order to review a decision of the Court of Appeals for the Seventh Circuit, which is in general agreement with certain decisions of the second and ninth circuits but in sharp conflict with the decisions of five other circuits.

The first, third, fourth, fifth, and eighth circuits have consistently held that a dismissal, when it is based upon the conduct of the litigant's attorney, rather than on the conduct of the litigant himself, should be invoked only under extreme circumstances. The equitable principles that govern the courts' decisions in those circuits are the following:

- 1) To favor adjudication on the merits;
- 2) To avoid punishing a litigant for the acts or omissions of his attorney;
- 3) To consider the amount of prejudice suffered by one party in imposing sanctions upon the offending party; and
- 4) To apply sanctions less severe than dismissal whenever possible.

The decision that the Petitioner requests this Court to review affirmed the dismissal of the Petitioner's cause of action solely because of the conduct of his counsel, without regard to the absence of prejudice to the Respondent and without consideration of less severe and more appropriate sanctions.

OPINIONS BELOW

The opinion of the court of appeals affirming the decision of the district court (A. 1a) is unreported. The opinion of the district court dismissing the Petitioner's case for want of prosecution (A. 8a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1978. A timely petition for rehearing was denied on November 13, 1978 (A. 7a) and this petition

for a writ of certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether Petitioner's cause of action may be dismissed for want of prosecution less than six months after it was filed and without consideration of less drastic sanctions, thereby depriving the Petitioner of an adjudication of his claim on the merits *solely* because of the acts or omissions of the Petitioner's attorney.

STATEMENT OF THE CASE

The Petitioner's Complaint was filed on March 30, 1977, and was based on an alleged breach of a contract that had been entered into between the Petitioner and the Respondent wherein the Petitioner purchased from the Respondent a twenty percent (20%) interest in a restaurant known as "Sambo's Portage" and became manager of that restaurant. The Petitioner's Complaint also alleged a breach of other group joint venture agreements between the parties.

Summons was served on the Respondent on April 19, 1977. The Respondent filed its appearance and answer on May 9, 1977. A status call was held before Judge Julius Hoffman on July 21, 1977. At that time, Judge Hoffman set the trial of the case for September 20, 1977, although the attorney representing the Petitioner indicated to the court that, because of the discovery that remained to be completed, the September 20, 1977, trial setting was not realistic. No discovery cut-off date was established nor was a date for the submission of a final pre-trial order set. (A. 18a)

On September 20, 1977, the Petitioner's attorney presented a motion for a continuance supported by the attorney's affidavit setting forth that various depositions had been set for the following month and that he, personally, was engaged in trial in Niles, Illinois, and was, therefore, unavailable for trial. (A. 10a) Judge Hoffman entered an order denying the motion for a continuance and dismissed the Petitioner's case for want of prosecution.

On October 7, 1977, the Petitioner's attorney presented a motion requesting that the district court vacate its dismissal order and set the matter for trial within thirty (30) days. This motion was also denied. (A. 13a)

The district court, in dismissing the Petitioner's case for want of prosecution and in denying the motion to vacate filed by the Petitioner's attorney, cited the fact that the Petitioner's attorney had had two months' notice of the trial setting and should have been able to complete his discovery and be available to begin the trial on the date scheduled. (A. 22a, 26a)

The court of appeals, in affirming the district court, also focused upon the actions of the Petitioner's attorney, which it felt evidenced "an unqualified indifference to the September 20th court commitment." There is no evidence anywhere in the record that the dismissal for want of prosecution was based in any way upon the actions of the Petitioner. The court of appeals clearly recognized this and yet affirmed the dismissal for want of prosecution suggesting that the Petitioner had a remedy in the form of a malpractice action against his attorney. (A. 6a)

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF FIVE OTHER COURTS OF APPEALS AS TO WHEN A LITIGANT'S CAUSE OF ACTION MAY BE DISMISSED FOR WANT OF PROSECUTION SOLELY BECAUSE OF THE ACTS OR OMISSIONS OF THE LITIGANT'S ATTORNEY, THEREBY DEPRIVING LITIGANT OF AN ADJUDICATION OF HIS CLAIM ON THE MERITS.

In general, the various circuit courts of appeals have expressed a reluctance to approve the disposition of cases by means of default orders or dismissals for want of prosecution because such dispositions deprive the litigants of an adjudication on the merits of their defenses or claims. As will be discussed more fully below, five of the circuits; namely, the first, third, fourth, fifth and eighth, have clearly and consistently held that the sanction of dismissal, when it is based upon the conduct of counsel rather than the conduct of the party he represents, may be invoked only under *extreme circumstances*.

A review of the cases decided in these circuits reveals that there are certain common equitable principles with which the courts are concerned in passing upon the appropriateness of the sanctions imposed. *Reizakis v. Loy*, 490 F.2d 1132 (4th Cir. 1974), is illustrative of the concern of the courts in reviewing such cases. Therein, as in the case at bar, the trial court had granted a dismissal for want of prosecution when the plaintiff sought a continuance on the date of trial. The fourth circuit, in reversing the judgment and remanding the case for trial on the merits, stated as follows:

"Against the power to prevent delays must be weighed the sound public policy of deciding cases

on their merits [Citations omitted.] Consequently, dismissal 'must be tempered by a careful exercise of judicial discretion.' [Citation omitted.] While the propriety of dismissal ultimately turns on the facts of each case, criteria for judging whether the discretion of the trial court has been soundly exercised have been stated frequently. Rightfully, courts are reluctant to punish a client for the behavior of his lawyer. [Citation omitted.] *Therefore, in situations where a party is not responsible for the fault of his attorney, dismissal may be invoked only in extreme circumstances.* [Citation omitted.] Indeed, it has been observed that '[t]he decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff.' [Citation omitted.] Appellate courts frequently have found abuse of discretion when trial courts failed to apply sanctions less severe than dismissal. [Citations omitted.] And generally lack of prejudice to the defendant, though not a bar to dismissal, is a factor that must be considered in determining whether the trial court exercised sound discretion." (Emphasis added.) 490 F.2d 1132, 1135.

Similarly, in *McCargo v. Hedrick*, 545 F.2d 393 (4th Cir. 1976), the court, relying upon *Reizakis v. Loy*, 490 F.2d 1132, reversed a dismissal that had been entered against the plaintiff and noted as follows:

"There is no indication in the record that McCargo was personally responsible for her lawyer's delay in filing the third proposed pretrial order or that she or her lawyer was deliberately engaging in dilatory practices. . . . Nor is there any evidence that the defendants were prejudiced by the delay. . . . Finally, the district court's order dismissing the consolidated action does not indicate that any less

drastic sanctions were first considered." 545 F.2d 393, 396.

The record herein is equally silent on the three factors that the court in *McCargo* considered significant: (1) the lack of involvement on the part of the litigant and the absence of any intentional dilatory conduct on the part of the attorney; (2) the absence of any showing of prejudice that the defendant would suffer as a result of the delay; (3) the apparent failure on the part of the district court judge to consider first a less drastic sanction than dismissal.

In *Durham v. Florida East Coast Railway Company*, 385 F.2d 366 (5th Cir. 1967) the court of appeals reversed a dismissal under rule 41 that had been entered by the trial court. At the trial level, the plaintiff's attorney appeared on the date the case was set for trial and requested leave to amend his complaint, adding an additional count that was based upon newly discovered evidence. The trial court, noting that the case was the only jury trial case on the docket for that week and that there were 23 jurors in the courtroom ready to proceed, denied the motion for leave to amend and dismissed the case.

On review, the fifth circuit readily acknowledged that the trial court did have authority to enter a dismissal but stated as follows:

"The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff. See *Link v. Wabash R. Co.*, 1962, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734; *Ockert v. Union Barge Line Corp.*, 3 Cir. 1951, 190 F.2d 303; *Joseph v. Norton Co.*, S.D. N.Y. 1959, 24 F.R.D. 72, 2 Cir., 273 F.2d 65; and

other cases noted, 28 U.S.C.A. Rule 41, esp. Note 53." 385 F.2d 366, 368.

The *Durham* court then reviewed the record, a record that is quite similar to the record herein, and concluded that the actions of the plaintiff's attorney were not sufficiently "contumacious" to justify the dismissal of his client's case.

"The record here does not disclose the reason for the failure of the plaintiff's attorney to make a timely motion to amend. The 'new' evidence, as the trial judge noted, was evidence furnished by the plaintiff himself relating to a 'defective coupling'. The attorney may have been negligent in failing to discover the new evidence sooner than he did. He may have been lacking in the consideration lawyers should have for witnesses, opposing counsel, and the trial judge—if he deliberately withheld until the last minute his motion to amend. But there is no evidence of his bad faith in the record. And we consider that his negligence was insufficient to justify dismissal of the complaint with prejudice. . . .

"The trial judge was of course concerned that witnesses and attorneys had travelled long distances; that jurors had been assembled for this case at Fort Pierce (this was the only jury case scheduled at that term); and that the plaintiff's refusal to proceed inconvenienced all of these. But '*Courts exist to serve the parties, and not to serve themselves, or to present a record with respect to dispatch of business. . . . For the court to consider expedition for its own sake "regardless" of the litigants is to emphasize secondary considerations over primary.*' *Alamance Industries, Inc. v. Filene's*, 1 Cir. 1961, 291 F.2d 142, 146." (Emphasis added.) 385 F.2d 366, 368.

Similarly, in *Boazman v. Economics Laboratory, Inc.*, 537 F.2d 210 (5th Cir. 1976), the court reversed a dismissal under rule 41(b) stating as follows:

"[D]ismissal . . . is such a severe sanction that it is to be used only in extreme circumstances, . . . where there is a clear record of delay or contumacious conduct,' . . . and 'where lesser sanctions would not serve the best interests of justice.'" 537 F.2d 210, 212.

In the third circuit decision of *Dyotherm Corporation v. Turbo Machine Company*, 392 F.2d 146 (3d Cir. 1968) the court of appeals reversed a dismissal for want of prosecution entered by the lower court judge and remanded the case for a trial on the merits. The facts in *Dyotherm* reflect a flagrant disregard on the part of the plaintiff's attorney for the court's orders. On the trial date, which the court had set five months previously, and which date was more than three years after the suit was filed, the plaintiff's attorney appeared and without an appropriate affidavit, requested a continuance because the president of Dyotherm was ill. After first dismissing the case, the district judge vacated the dismissal on the condition that the plaintiff pay the defendant \$1,185 in attorney's fees. The court also ordered the plaintiff to respond to the defendant's counterclaim within ten days. The defendant moved to reinstate the dismissal when, after eight months, the plaintiff had not paid the defendant's attorney's fees nor filed an answer to the counterclaim. The plaintiff's attorney claimed that his client's financial condition prevented it from paying the attorney's fees. The district judge ordered the plaintiff to produce evidence of his client's financial condition and, when this was not done within the required time, reinstated the dismissal. In spite of this history of unexplained delays and non-compliance with the court's orders, the court of appeals reversed the district court stating as follows:

"The tardiness of counsel, especially on October 5 [the trial date] showed disrespect, and failure to

be prepared with other witnesses is inexcusable. . . . But the price for these derelictions has been exacted; counsel has been held in contempt and fined, and Dyotherm is required to pay a substantial amount to obtain relief from the order of dismissal." 392 F.2d 146, 149.

Accord, *Marshall v. Sielaff*, 492 F.2d 917 (3d Cir. 1974).

In *Richman v. General Motors Corporation*, 437 F.2d 196 (1st Cir. 1971), neither the plaintiff nor his attorney appeared in court on the date set for trial. The complaint had been filed 19 months previously. The court of appeals, recognizing the harshness of dismissal and that there were other sanctions that would have been more appropriate, reversed the district court, stating as follows:

"Dismissal is a harsh sanction which should be resorted to only in extreme cases. The court has a broad panoply of lesser sanctions available to it. Moreover, the power of the court to prevent undue delays must be weighed against the policy of the law favoring the disposition of cases on their merits." 437 F.2d 196, 199.

The Court of Appeals for the Eighth Circuit has followed the first, third, fourth and fifth circuits in refusing to allow dismissal, except under extreme circumstances, when the basis for the dismissal is the dilatory conduct of counsel. In *Moore v. St. Louis Music Supply Co., Inc.*, 539 F.2d 1191 (8th Cir. 1976), the district court had dismissed the plaintiff's case because of his attorney's failure to answer the trial call. The Court of Appeals for the Eighth Circuit acknowledged the trial court's legitimate concern in the expeditious handling of its court call, but ruled that this concern was not "sufficient to justify the harsh consequences of forever denying a litigant his day in court." 539 F.2d 1191, 1193.

The court then went on to discuss these sometimes conflicting considerations in language that is strikingly applicable to the instant case.

"This process of balancing focuses in the main upon the degree of egregious conduct which prompted the order of dismissal and to a lesser extent upon the adverse impact of such conduct upon both the defendant and the administration of justice in the District Court. [Citations omitted.] *Where the offending conduct results from conflicting court commitments of the attorney rather than the indifference or dilatory tactics of the litigant himself, there are other tools at the trial judge's disposal which do not impact so decisively upon the innocent litigant.* [Citation omitted.] 'Dismissal with prejudice for failure to prosecute is "• • • a drastic sanction which should be sparingly exercised • • •.'" [Citation omitted.]"

• • •

"While an attorney is an officer of the court and has undertaken a solemn obligation to respect and uphold its processes, it is also true that he is more often than not the officer of many courts whose processes are not coordinated and frequently compete for the attorney's attention and presence. . . .

"In this case, the attorney for Moore was over-extended. Though he had numerous opportunities to present his conflict problem to the District Court, he did not do so. *By failing to keep himself informed about the progress of the docket and in not reporting to the District Court, the attorney inexcusably caused available court time to go unused when such court time was badly needed to meet the court's case-load. For this he may properly be subject to discipline, but it does not follow in this case that his client should be the one to feel the lash.*" (Emphasis added.) 539 F.2d 1191, 1193-1194.

See also *M. S. v. Wermers*, 557 F.2d 170 (8th Cir. 1977).

Therefore, the policy that has been followed in the five circuits discussed above in reviewing cases such as the instant case is (1) to favor adjudication on the merits; (2) to avoid punishing a litigant for the acts or omissions of his counsel; (3) to consider the amount of prejudice suffered by one party in imposing sanctions upon the offending party; and (4) to apply sanctions less severe than dismissal whenever possible. Indeed, a review of prior seventh circuit decisions suggests that, prior to that court's decision herein, the seventh circuit was also in accord with the five circuits that clearly follow this policy. See *Moreno v. Collins*, 362 F.2d 176 (7th Cir. 1966); *Sapiro v. Hartford Fire Insurance Company*, 452 F.2d 215 (7th Cir. 1971), and *Scarver v. Allen*, 457 F.2d 308 (7th Cir. 1972).

By its decision herein, the seventh circuit has now put itself directly in opposition to the five circuits discussed above, and it has aligned itself with the second and ninth circuits, which, in certain decisions, have indicated a willingness to sustain dismissals even when based solely upon the acts or omissions of a litigant's attorney. However, it is highly questionable whether the second and ninth circuits would have approved the actions of the district court in the instant case. A review of the record herein fails to reveal "the extreme circumstances" that the courts have required before imposing the harsh sanction of dismissal. Clearly, the plaintiff's trial attorney did not display the willful or contumacious conduct that would have justified the court's imposition of this sanction. There is no suggestion in the record, nor could there be, that plaintiff himself was involved in the delay of this case or in the inability of his attorney to be prepared for trial on the date set. Under these circumstances, reviewing courts have con-

sistently held that, if sanctions are to be entered, they should not be so severe as to deprive the innocent litigant of his day in court.

Finally, there is no indication in the record that the defendant would have suffered any prejudice or harm as a result of a 30-day delay in the trial of this case. As a result of the 30-day continuance requested by plaintiff's trial counsel, this case would have reached trial within seven months of the date of filing—an admirable record in the northern district of Illinois where the average median time from date of filing to trial is twenty-four months and where ninety percent of the cases are tried more than eight months after the filing date. Assuming, *arguendo*, that the defendant would suffer some prejudice or harm as a result of a 30-day continuance, an alternative, less drastic sanction would nevertheless have been equally effective.

II. THE SEVENTH CIRCUIT COURT OF APPEALS ERRONEOUSLY MISAPPLIED THE CASES CITED IN SUPPORT OF ITS DECISION, INCLUDING A DECISION OF THIS COURT; THE UNDERLYING FACTS IN THE CASES CITED ARE CLEARLY DISTINGUISHABLE FROM THE FACTS HEREIN.

The authorities previously cited by Petitioner stand for the well-established proposition that when a litigant is exposed to court sanctions solely because of the conduct of his counsel, the sanction should not be so harsh as to deprive the litigant of his day in court. Furthermore, the cases cited by the Court of Appeals for the

¹ These figures are from a table of statistics obtained from the Office of the Clerk of the United States District Court for the Northern District of Illinois. The table is attached as Appendix J. (A. 30a)

Seventh Circuit in support of its decision stand for the same proposition. The opinions in *Link v. Wabash R. Co.*, 370 U.S. 626 (1962), and *Jameson v. DuComb*, 275 F.2d 293 (7th Cir. 1960), countenance dismissal as an appropriate sanction only when, as in *Jameson*, there is direct involvement on the part of the plaintiff himself or, as in *Link*, there is a blatant and calculated pattern of dilatory conduct over a period of years on the part of counsel.

Jameson v. DuComb, 275 F.2d 293, holds that a party will be held responsible for the consequences of his own actions. In *Jameson*, the plaintiff, who knew of the September trial setting in April, nevertheless scheduled a hunting trip to Alberta, Canada, and had his attorney present the hunting trip as a basis for a motion to continue the trial. The seventh circuit affirmed the dismissal stating as follows:

"The date for the trial was fixed many months in advance at a pretrial conference and it was not unreasonable to require the plaintiff [not his counsel], who started this litigation, to so arrange his affairs that he would be present upon September 8, 1959, at the time which the court had set aside for the trial of his case." 275 F.2d 293, 294.

The Petitioner takes no exception to the holding in *Jameson* but submits that *Jameson* is not applicable to the facts in the instant case. Herein there is no evidence of any conduct on the part of the Petitioner that was in violation of any discovery request or court order. There is nothing in the record to suggest that the Petitioner himself had not fully cooperated in the preparation of his case for trial or that he himself was unable or unwilling to proceed to trial on the date set by the court. Therefore, because the dismissal in the *Jameson* case was based

upon the actions of the plaintiff himself, that decision does not support the action taken by the seventh circuit herein.

In *Link v. Wabash R. Co.*, 370 U.S. 626, this Court reviewed what had been the oldest civil case on the docket in the northern district of Indiana. It was dismissed six years after its filing when the plaintiff's attorney deliberately failed to attend a pre-trial because he was "preparing papers" to file in another action. Clearly, the decision to affirm the dismissal was based on the history of repeated delays that were caused by the plaintiff or his counsel. The *Link* case was replete with instances in which the conduct of the plaintiff's counsel, either through failure to comply with discovery requests or other dilatory activities, frustrated the trial court's attempts to move the case to a timely disposition.

Although the *Link* opinion does not refer to any act on the part of the plaintiff himself that influenced the court to affirm the dismissal, it would not have been unreasonable to assign some responsibility for the dismissal to the plaintiff when he had allowed his attorney to delay the disposition of the matter for over six years.

In a four to three decision (with two abstentions), Justice Harlan, writing for the majority, expressly limited the holding to the facts before him, which included an inexcusable six-year delay:

"We need not decide whether unexplained absence from a pretrial conference would *alone* justify a dismissal with prejudice if the record showed no other evidence of dilatoriness on the part of the plaintiff. For the District Court in this case relied on *all* the circumstances that were brought to its attention, including the earlier delays. And while the Court of Appeals did not expressly rest its judgment on peti-

tioner's failure to prosecute, it nonetheless set out the entire history of the case (including the statement made by the district judge's secretary that it was 'the oldest civil case on the court docket'), noted that the District Court had considered the absence of a pretrial conference in light of 'the history of this litigation' and 'of all the circumstances surrounding counsel's action in the case,' [Citation omitted.] and held that there was no abuse of discretion in dismissing the action 'under the circumstances of this case.' [Citation omitted.] This obviously amounts to no broader a holding than that the failure to appear at a pretrial conference may, in the context of other evidence of delay, be considered by a District Court as justifying a dismissal with prejudice." 370 U.S. 626, 634-635.

The majority opinion in *Link* drew a lengthy and forceful dissent from Justice Black whose comments are precisely applicable to the equitable considerations presented to this Court in the instant case:

"It is true that by its ruling today the Court finally puts an end to this case and thus clears it from all federal dockets. But in view of the fact that the merits of the case have never been reached, I cannot believe there should be too much rejoicing at this fact. The end result of the procedures adopted here has been that much time has been wasted and yet no justice has been done. I find it highly regrettable that the Court feels compelled to place its stamp of approval upon such procedures.

"It may not be of much importance to anyone other than the plaintiff here and his family whether this case is tried on its merits or not. To my mind, however, it is of very great importance to everyone in this country that we do not establish the practice of throwing litigants out of court without notice to them solely because they are credulous enough to entrust their cases to lawyers whose names are accredited

as worthy and capable by their government. I fear that this case is not likely to stand out in the future as the best example of American justice." 370 U.S. 626, 649.

It is respectfully submitted that the conduct of Petitioner's counsel herein who, at worst, erred in thinking he could obtain a continuance of the first and only trial setting five and one-half months after the filing of the action, should not, on the basis of *Link* or of any reported case, serve as justification for depriving the Petitioner of his day in court.

III. THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS ERRED IN ASSUMING THAT THE PETITIONER HAS A VIABLE ALTERNATIVE REMEDY IN THE FORM OF A POSSIBLE CAUSE OF ACTION AGAINST HIS TRIAL COUNSEL.

The Court of Appeals for the Seventh Circuit, relying upon a suggestion contained in Footnote 10 of *Link v. Wabash*, 370 U.S. 626 (1962), asserts that the Petitioner is not without a remedy in that he could file a malpractice action against his trial counsel. (A. 6a) It is respectfully submitted that the burden of proof imposed upon a plaintiff in a legal malpractice action is so onerous that the likelihood of recovery in such an action would be remote.

In Illinois, as in most states, in order for a plaintiff to prevail against an attorney in a malpractice action, he must first establish that the defendant violated the standard of care required of an attorney, and he must also prove that, but for the negligence alleged, the plaintiff would have been successful in the prosecution or defense of the action in question. See *Brown v. Gitlin*, 19 Ill.

App.3d 1018, 313 N.E.2d 180 (1st Dist. 1974); *Kohler v. Woollen, Brown & Hawkins*, 15 Ill.App.3d 455, 304 N.E.2d 677 (4th Dist. 1973); *Trustees of Schools v. Schroeder*, 2 Ill.App.3d 1009, 278 N.E.2d 431 (1st Dist. 1971); *Dorf v. Relles*, 355 F.2d 488 (7th Cir. 1966); and *Bonhiver v. Rotenberg, Schwartzman & Richards*, 461 F.2d 925 (7th Cir. 1972).

With regard to establishing a violation of the standard of care, it is clearly the law in Illinois, as in most states, that the testimony of an expert is required to establish the standard of care, the violation of which constitutes the alleged malpractice. See *Brown v. Gitlin*, 19 Ill. App. 3d 1018, and *Dorf v. Relles*, 355 F.2d 488 (7th Cir. 1966). The most recent expression by the Illinois Supreme Court on this point appears in *Walski v. Tiesenga*, 72 Ill.2d 249, 381 N.E.2d 279 (1978). In *Walski*, the Supreme Court of Illinois reaffirmed the long-standing Illinois rule that the testimony of an expert is required to establish malpractice.

With regard to the standard of proof required in malpractice cases, the courts have consistently treated legal and medical malpractice cases alike. See *Olson v. North*, 276 Ill.App. 457 (1934); *Dorf v. Relles*, 355 F.2d 488 (7th Cir. 1966). Thus, the Petitioner would be confronted with the same standard of proof required by the *Walski v. Tiesenga*, 72 Ill. 2d 249, opinion and would, therefore, be required to produce the testimony of an expert that his trial attorney in this cause was negligent in not being prepared to commence trial five and one-half months after the filing of what, according to the record herein, was a complex contract action. Clearly, any legal expert testifying in this regard would be required to take cognizance of the statistics relating to the disposi-

tion of cases in the United States District Court for the Northern District of Illinois. (A. 30a)

Obviously, it is uncertain whether an expert would testify that an attorney's failure to prepare a case such as this for trial within five and one-half months of filing constitutes a violation of the standard of care imposed upon attorneys. However, assuming *arguendo*, that the testimony of such an expert could be obtained, Petitioner would then face the requirement that could well prove to be insurmountable. As stated above, the plaintiff in a malpractice action, once he has established a violation of the standard of care, must show that that violation or negligence was the proximate cause of the damages that he has sustained. In other words, he must prove that, but for the alleged negligence, he would have been successful in the prosecution or defense of the action in question. See *Kohler v. Woollen, Brown & Hawkins*, 15 Ill.App.3d 455; *Trustees of Schools v. Schroeder*, 2 Ill.App.3d 1009; and *Bonhiver v. Rotenberg, Schwartzman & Richards*, 461 F.2d 925.

It is submitted that Petitioner would have much greater difficulty in meeting this second element of proof required in the prosecution of a malpractice action against his attorney than he would face in the original action against Sambo's. Since Respondent Sambo's would not be a party in a malpractice action, Petitioner would be deprived of many valuable discovery tools and would be further frustrated at the trial level by being unable to compel Sambo's, a California corporation, to produce documents or to compel the appearance of various employees of Sambo's who reside out-of-state and whose testimony would be required in order for Petitioner to prove his case.

In summary, in a malpractice action under the facts herein, Petitioner would be required to prove two cases in one: the first against his trial counsel and the second against the original defendant, Sambo's Restaurant, Inc. Moreover, he would be required to prove his action against Sambo's without having Sambo's as a party.

In light of the heavy burden of proof that would confront the Petitioner, it is unrealistic to suggest that a malpractice suit against his attorney is a viable alternative to his action against Sambo's. Indeed, such a suggestion is naive when one considers the effect it would have it, as part of a national policy, federal courts were urged to dismiss cases because of the dilatoriness of the litigants' attorneys on the false assumption that the litigants' rights were protected by the prospects of future malpractice actions. It is respectfully submitted that this Court, by its decision in *Link v. Wabash R. Co.*, 370 U.S. 626, did not intend to sanction the routine and callous dismissal of a litigant's cause of action solely because of the acts or omissions of his attorney. By considering portions of the *Link* decision out of context and applying them to the facts presented in the record herein, the Court of Appeals for the Seventh Circuit not only has improperly deprived the Petitioner of his right to a disposition of his claim on the merits, but also has established a policy, which, if approved by this Court, would materially undermine the administration of justice in the federal courts.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS D. MORRISSEY
130 East Randolph Drive
Chicago, Illinois 60601
312-861-2819
*Attorney for Petitioner,
John D. Brazil.*

Of Counsel:

PETER J. MONE
MICHAEL K. MURTAUGH
130 East Randolph Drive
Chicago, Illinois 60601
312-861-8000

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APPENDIX A

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago, Illinois 60604

(Argued May 24, 1978)

September 11, 1978

Before

HON. THOMAS E. FAIRCHILD, *Chief Circuit Judge*

HON. PHILIP W. TONE, *Circuit Judge*

HON. ROY W. HARPER, *Senior District Judge**

JOHN D. BRAZIL,

Plaintiff-Appellant,

vs.

SAMBO'S RESTAURANT, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 77C 1044,

JULIUS J. HOFFMAN, *Senior Judge.*

ORDER

This appeal arises out of a dismissal of plaintiff's action for want of prosecution pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Plaintiff's complaint was filed on March 30, 1977, in the United States District Court for the Northern District of Illinois. Plaintiff's cause of action was based on an alleged breach of contract arising out of a joint venture agreement en-

* Senior District Judge Roy W. Harper of the Eastern and Western Districts of Missouri sitting by designation.

tered into by plaintiff and defendant. Service of process was made on the defendant on April 19, 1977. The defendant answered on May 9, 1977. A status call was held before Senior Judge Julius Hoffman on July 21, 1977, at which time the case was at issue. Judge Hoffman set the trial of plaintiff's case for September 20, 1977. At that time plaintiff indicated to the Court that it had discovery to undertake and that September 20, 1977, was not a realistic trial date. Judge Hoffman stated that the purpose of discovery was not to delay trials. Plaintiffs acquiesced in the setting.

From July 21st to September 19th, the day before the scheduled trial date, plaintiff did not give any indication either to the defendant or to the Court that the trial would not proceed as scheduled on September 20th. On September 19th, in response to a telephone call from the Clerk of the District Court, plaintiff's counsel advised the Clerk that plaintiff would not be ready for trial. On the afternoon of September 19th, plaintiff served defendant with notices to take his deposition on October 10th, October 17th and October 26th. Plaintiff had not pursued any discovery prior to that date.

The following morning, September 20th, the case was called for trial. Defendant's counsel stated that defendant was ready for trial. However, the plaintiff did not appear in court, nor was his trial counsel present. An associate of plaintiff's trial counsel answered the call and presented plaintiff's motion for a continuance. Defendant's counsel objected to the continuance. The district court denied the motion for a continuance and asked the marshal to bring in a selection of veniremen. The associate counsel then stated that he knew nothing about the case and that there was no way plaintiff could proceed to trial. The Court then ordered the case dismissed for want of prosecution.

On October 7, 1977, plaintiff's counsel presented a motion to reconsider the order of dismissal with a supporting affidavit in which counsel listed the various actions he had taken in this litigation. Apart from a partial settle-

ment, which had been agreed to prior to the status call, counsel's activity consisted primarily of communications with the client with respect to gathering facts. No reason was given why plaintiff waited until the day of trial before apprising the district judge that he was not prepared for trial. The Court denied the plaintiff's motion to reconsider.

The inherent authority of a Federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute is expressly recognized by Rule 41(b), which provides:

"Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

It is well established that there is no precise rule which sets forth the circumstances that are necessary to sustain a dismissal for failure to prosecute. *Sandee Manufacturing Co. v. Rohm & Haas Co.*, 298 F. 2d 41 (7th Cir. 1962). Rather, each case must be examined "with regard to its own peculiar procedural history and the situation at the time of dismissal." *Sandee Manufacturing Co. v. Rohm & Haas Co.*, supra at 43. When, as in this case, the trial court has exercised its discretion, and dismissed for want of prosecution, the question upon appeal is whether the trial court has abused its discretion in dismissing the plaintiff's complaint. *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962).

In the present case, the plaintiff has cited no facts to sustain a charge of abuse of discretion on the part of the trial court. As a reason for his not being prepared on the trial date, plaintiff's counsel stated that he did not have

sufficient time to complete discovery, because of the complexity of the case and the fact that other office matters (a criminal appellate case) had restricted the amount of time in which he was able to work on the case. However, to accept this argument would be to ignore the facts of the case. The plaintiff had over five and one-half months in which to undertake discovery. However, from the filing of the complaint on March 30, 1977, until the scheduled trial date on September 20, 1977, no discovery whatsoever was undertaken. It was not until the day before trial, September 19, 1977, that plaintiff served defendant with notices of deposition, which were scheduled for October 10th, October 17th, and finally October 26th. Under these facts, we do not believe that a failure to complete discovery is an accurate justification for the failure of plaintiff's counsel to meet the scheduled trial date.

We believe that the actions on the part of plaintiff's counsel evidence an unqualified indifference to the September 20th court commitment. First of all, despite having had two months' notice of the scheduled trial date, plaintiff's counsel waited until the day before trial to "apprise" the Court of his not being prepared. The untimeliness of the notice is compounded by the fact that the manner of plaintiff's counsel of apprising the Court was not by way of an official written request; rather it was over the telephone, in response to a call from the Clerk, that plaintiff's counsel informed the clerk that he would not be ready for trial. Secondly, on the date set for trial, September 20, 1977, plaintiff's trial counsel was in State Court for the trial of another lawsuit. Certainly the fact that plaintiff's trial counsel was not going to be available for trial on the 20th of September must have been apparent well in advance of the scheduled date. Nevertheless, plaintiff's counsel made no effort to inform the court of such fact. The flagrant disregard by plaintiff's counsel of the scheduled trial date is further evidenced by his affidavit in support of his motion to dismiss, dated September 20, 1977, where he states, "Unless these depositions reveal the need for additional discovery, affiant anticipates being prepared to proceed

with the trial of this cause around the middle of November, 1977."

Based upon the aforementioned facts, we must conclude the following: One, that plaintiff's counsel, subsequent to the status call, on July 21, 1977, decided unilaterally that he was not going to proceed to trial on the Court's designated date; and two, that the conduct of plaintiff's counsel manifests an unqualified disregard for the Court's docket and its internal procedures. Under these circumstances we cannot say that the trial court abused its discretion in dismissing the plaintiff's case for want of prosecution.

Plaintiff claims that only a pattern of continuous disregard of court orders to proceed and a long history of delay over a period of years have been held to warrant a dismissal of one's cause of action. We cannot agree with this argument. In the case of *Jameson v. Ducomb*, 275 F. 2d 293 (7th Cir. 1960), the parties were given approximately four months' notice of the trial date. On the date set for trial, the plaintiff filed a motion for a continuance in which he averred, in effect, that he had been unable to take the defendant's deposition and that plaintiff himself would be unable to be present for trial because "he is engaged in guiding certain big game hunting parties . . . in the Province of Alberta." Notwithstanding the fact that the plaintiff had engaged in no pretrial misconduct, the court denied the plaintiff's motion and entered an order dismissing the case for want of prosecution. On appeal, this court affirmed the judgment of the district court, stating:

"The date for the trial was fixed many months in advance at a pretrial conference and it was not unreasonable to require plaintiff, who started this litigation, to so arrange his affairs that he would be present upon September 8, 1959, at the time which the court had set aside for the trial of his case."

It is also argued that the plaintiff should not be penalized by having his action dismissed with prejudice where

the delay or lack of diligence is the fault of counsel. In this matter, we cannot concur with plaintiff. This issue was discussed by the Supreme Court in footnote 10 of its opinion in *Link v. Wabash Railroad Company*, supra at 634:

“* * * And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant.”

In the present case, plaintiff's counsel had every opportunity to either prepare himself for the scheduled trial date, or make timely arrangements for the action to be continued. Nevertheless, plaintiff's counsel chose to do neither. We cannot justify the plaintiff's not being penalized for the omissions of his counsel, where non-punishment of the plaintiff would result in the burden being borne by the defendant. As pointed out by the Court in *Link*, supra, the plaintiff is not without a remedy.

For the above stated reasons we affirm the judgment of the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

November 13, 1978

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*

HON. PHILIP W. TONE, *Circuit Judge*

HON. ROY W. HARPER, *Senior District Judge**

JOHN D. BRAZIL,

Plaintiff-Appellant,

No. 77-2231

vs.

SAMBO'S RESTAURANTS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77-C-1044

JULIUS J. HOFFMAN, *Judge*.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellant, all of the judges on the original panel having voted to DENY the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Senior District Judge Roy W. Harper of the Eastern and Western Districts of Missouri is sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT

Northern District Of Illinois

Eastern Division

Name of Presiding Judge, Honorable Julius Hoffman

Cause No. 77 C 1044

Date September 20, 1977

Title of Cause

Brazil v. Sambo's Restaurants, Inc.

Brief Statement of Motion

Plaintiff's Motion To Reset The Trial Date

Names and Addresses of moving counsel

Robert E. Senechalle

Plunkett, Nisen, Elliott & Meier

One North La Salle Street

Chicago, Illinois

Representing

John D. Brazil, Plaintiff

Names and Addresses of other counsel
entitled to notice and names of parties
they represent.

James M. Goff, Sonnenschein, Carlin,

Nath & Rosenthal

8000 Sears Tower

Chicago, Illinois 60606

Sambo's Restaurants, Inc.

Plaintiff's motion to reset the trial date is denied.
Cause dismissed for want of prosecution.

/s/ Hoffman, SJ.

Sep 20 1977

APPENDIX D

UNITED STATES DISTRICT COURT

Northern District Of Illinois

Eastern Division

Name of Presiding Judge, Honorable Hoffman

Cause No. 77 C 1044

Date 10-7-77

Title of Cause

John D. Brazil v.
Sambo's Restaurants, Inc.

Brief Statement of Motion

Reconsider Order Of 9-20-77 Dismissing Case For
Want of Prosecution.

Names and Addresses of moving counsel

Robert E. Senechalle, Jr.

One N. LaSalle, Chicago

Representing

Plaintiff

Names and Addresses of other counsel
entitled to notice and names of parties
they represent.

Sonnenschein, Carlin, Nath & Rosenthal

Sears Tower, Suite 8000

Chicago, Illinois

Plaintiff's motion for reconsideration of order of
September 20, 1977 dismissing case for want of
prosecution is denied.

/s/ Hoffman, SJ.

Oct 7 1977

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

Northern District Of Illinois

Eastern Division

JOHN D. BRAZIL,

Plaintiff,

vs.

SAMBO'S RESTAURANTS, INC.,

Defendant.

No. 77 C 1044

Plaintiff Demands Trial by Jury

MOTION FOR A CONTINUANCE

Now comes the plaintiff, John D. Brazil, and moves this Honorable Court that trial of this matter previously set for September 20, 1977, be continued for a period of 60 days so that plaintiff can complete his discovery and properly prepare this matter for trial. In support of this Motion, plaintiff attaches the Affidavit of his attorney, Robert E. Senechalle, Jr., as Exhibit A.

Wherefore, plaintiff prays that the trial of this matter be continued for a period of not less than 60 days so that plaintiff may complete his discovery.

/s/ Plunkett, Nisen, Elliott & Meier
Attorneys for Plaintiff

Robert E. Senechalle, Jr.
Plunkett, Nisen, Elliott & Meier
Attorneys for Plaintiff
One North LaSalle Street
Chicago, Illinois 60602
346-7800

AFFIDAVIT

Robert E. Senechalle, Jr., after first being duly sworn on oath deposes and states that he is the attorney of record for John D. Brazil in the above referenced matter and that he makes the following statement in support of the Motion of John D. Brazil for a continuance of the trial of this case.

1. That Plaintiff's lawsuit was filed on March 30, 1977. The answer of the Defendant was filed on May 9, 1977. A status report was held on July 21, 1977.

2. Since the date of the status report in this matter, Affiant has met with the Plaintiff and has had several telephone conversations with Plaintiff regarding the facts of this case. Affiant has, pursuant to his request, recently received a detailed statement of relevant facts in this case from Plaintiff. Affiant is informed by the Plaintiff that additional statements will be forthcoming shortly from several of Plaintiff's witnesses. These factual summaries and witness statements are necessary to assist Affiant in the conduct of discovery in this case. Plaintiff has scheduled Defendant's deposition in this matter for October 10, October 17 and October 26, 1977. These Notices of Deposition are also accompanied by requests for production of documents. Unless these depositions reveal the need for additional discovery, Affiant anticipates being prepared to proceed with the trial of this cause around the middle of November, 1977.

3. Since the date of the status report in this matter, Affiant has arranged for the payment by Defendant of certain monies owed by it to Plaintiff. Affiant also completed the settlement of a related lawsuit involving Plaintiff's partnership with the Defendant. That suit is entitled *Portage National Bank v. John D. Brazil*, Case No. 76 PSC 2657, in the Porter Superior Court, Porter County, Indiana.

4. In addition to the above, (as well as Affiant's vacation in August), other office matters, including the preparation of a Brief for the Appellate Court, Third Dis-

trict in the case of *People of the State of Illinois v. James Boucher*, Case No. 76-353 which is due to be filed on October 7, 1977, have prevented Plaintiff from completing discovery in this matter in time for trial on September 20, 1977.

5. The discovery scheduled in this case for October, 1977, is essential to the full presentation of the issues alleged in Plaintiff's Complaint.

6. Affiant further states that he has been as diligent in the prosecution of Plaintiff's case as has been reasonably possible in light of Affiant's other professional responsibilities. Plaintiff has requested no other continuances.

7. Affiant is scheduled to be engaged in trial in Niles, Illinois at 9:30 a.m. on September 20, 1977, in the case of *People v. Joel Dosik*, Case No. 77-3-004065. Otherwise Affiant would have been present in open Court on September 20, 1977, to present the above related matters personally to the Court.

Further Affiant States Not.

/s/ Robert E. Senechalle, Jr.
Robert E. Senechalle, Jr.

Subscribed And Sworn
To Before Me This
Day Of September, 1977.

Notary Public

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

JOHN D. BRAZIL,

Plaintiff,

vs.

SAMBO'S RESTAURANTS, INC.,

Defendant.

No. 77 C 1044

PLAINTIFF'S MOTION FOR
RECONSIDERATION

Now Comes the Plaintiff, John D. Brazil, pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure and moves this Honorable Court that the order of dismissal for want of prosecution entered on September 20, 1977, be vacated and that plaintiff's cause reinstated and set for trial and in support thereof states as follows:

1. That plaintiff's complaint in this matter was filed on March 30, 1977. Defendant's appearance and answer were filed on May 9, 1977. This case was dismissed for want of prosecution on September 20, 1977.

2. Plaintiff had not failed to prosecute this case but was in the process of preparing the case for trial and had discovery depositions set for October 10th, 17th, and 26th, 1977. See the Affidavit of Robert E. Senechalle, Jr. attached hereto as Exhibit A and made a part hereof.

3. Plaintiff will be ready to try this case within 30 days of this date if the Court vacates its previous order of dismissal.

4. Rule 21 (a) of the Rules of the United States District Court for the Northern District of Illinois provides that "cases which have been inactive for more than six months *may* be dismissed for want of prosecution." Emphasis added. This case had not been inactive for more than six months and in fact this case was less than six months old on September 20, 1977 when it was dismissed for want of prosecution.

5. Dismissal in this case is too harsh a sanction for a case less than five months old when plaintiff was, at the time of the dismissal, in the process of getting the case ready for trial. See Exhibit A attached hereto. As the United States Court of Appeals, Fourth Circuit, stated in *Reizakis v. Loy*, 490 F. 2d 1132 (1974) "against the power to prevent delays must be weighed the sound public policy of deciding cases on their own merits. (Citation omitted) Consequently, dismissal must be tempered by a careful exercise of judicial discretion." 490 F. 2d 1135.

WHEREFORE, Plaintiff prays that this Court reconsider its order of September 20, 1977, and vacate the order dismissing this case for want of prosecution; accelerate discovery in this matter and set the case for trial 30 days hence.

/s/ Robert E. Senechalle, Jr.
Robert E. Senechalle, Jr.
Attorney for Plaintiff

Robert E. Senechalle, Jr.
Plunkett, Nisen, Elliott & Meier
Attorneys for Plaintiff
One North LaSalle Street - Suite 2300
Chicago, Illinois 60602
346-7800

State of Illinois)
) SS.
County of Cook)

IN THE UNITED STATES DISTRICT COURT

For The Northern District Of Illinois

Eastern Division

JOHN D. BRAZIL,

Plaintiff,

vs.

SAMBO'S RESTAURANTS, INC.,

Defendant.

No. 77 C 1044

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S
MOTION FOR RECONSIDERATION

Robert E. Senechalle, Jr., after first being duly sworn, deposes and states as follows:

1. Affiant is the attorney of record for plaintiff.
2. This action is a suit for breach of contract growing out of plaintiff's relationship, for a period in excess of five years, with the defendant as a partner, manager and investor in the defendant company. Plaintiff's complaint alleges actual damages in excess of \$750,000.
3. Plaintiff filed this lawsuit on March 30, 1977. Plaintiff promptly initiated service of summons on defendant. Defendant answered the complaint on May 9, 1977.
4. A status call was held in this case on July 21, 1977. On that date the court set a trial date of September 20, 1977. On July 21, 1977, Affiant told opposing counsel that it was unlikely that plaintiff could prepare this case for trial by September 20, 1977.

5. On September 20, 1977, Affiant filed a motion for continuance of this cause so that he could complete plaintiff's discovery. Three depositions had been set by plaintiff for October, 1977. On September 20, 1977, Affiant was engaged in a criminal case in the Circuit Court of Cook County, in the Niles branch court. Affiant's associate Ronald L. Lipinski presented the motion for continuance. The motion was denied and plaintiff's case was dismissed for want of prosecution.

6. Between the time of filing defendant's appearance and answer in this case in May, 1977 and the dismissal for want of prosecution on September 20, 1977, Affiant communicated by telephone and corresponded with defendant's attorney regarding this case. As a result of those communications a portion of this matter was settled and the proceeds were paid by defendant to plaintiff in August, 1977.

7. In August, 1977, Affiant received a detailed summary of the facts of this case from plaintiff which Affiant had requested in order to assist affiant in the depositions which Affiant scheduled for October. During this period Affiant also investigated the new matters which were raised by defendant in paragraph 3 of its answer to Count I.

8. Also during this period Affiant settled a case with the Portage National Bank which related directly to the case at bar and which was settled as a result of the monies obtained by plaintiff from the settlement of the portion of this case referred to above.

9. Plaintiff is a nonresident of Illinois, currently residing in Las Vegas, Nevada. Thus, Affiant has not had ready access to plaintiff in the gathering of the facts of this case and in the preparation of the case for trial.

10. Affiant has been active in the preparation of this case for trial between the time of its filing on March 30, 1977, and its dismissal for want of prosecution on September 20, 1977.

11. Affiant represents to this Court that if this case is reinstated and an accelerated discovery schedule is set by this Court, Affiant will be prepared to try this case within 30 days of the date that this case is reinstated.

FURTHER AFFIANT STATES NOT.

/s/ Robert E. Senechalle, Jr.

Subscribed and Sworn to before
me this 6th day of October, 1977.

/s/ Phyllis June Downey Stebbings
Notary Public

APPENDIX G

IN THE

UNITED STATES DISTRICT COURT

Northern District Of Illinois

Eastern Division

JOHN D. BRAZIL,

Plaintiff,

vs.

SAMBO'S RESTAURANTS, INC.,

Defendant.

No. 77 C 1044

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Hon. Julius J. Hoffman, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Thursday, July 21, 1977, at the hour of 10:00 o'clock a.m.

Appearances:

Messrs. Plunkett, Nisen, Elliot and Meier
One North LaSalle Street,
Chicago, Illinois

By: Mr. Robert Senechalle,
appeared on behalf of the plaintiff;

Messrs. Sonnenschein, Carlin, Nath and Rosenthal
8000 Sears Tower,
Chicago, Illinois 60606

By: Mr. Gerald Sherman,
appeared on behalf of the defendant.

The Clerk: 77 C 1044. John D. Brazil v. Sambo's Restaurants, Inc., status report.

Mr. Senechalle: Good morning, your Honor. Robert Senechalle from Plunkett, Nisen, Elliot and Meier, for the plaintiff.

Mr. Sherman: Good morning, your Honor. Gerald Sherman from Sonnenschein, representing the defendant, Sambo's Restaurants.

Your Honor, this is Mr. Goff's case, but Mr. Goff is in New York today and he asked me to step up for him.

The Court: I didn't hear you.

Mr. Sherman: I said this is Mr. Goff's case, but Mr. Goff is in New York and he asked if I could come over here for him this morning.

The Court: Do you represent the plaintiff?

Mr. Senechalle: Yes, Judge.

The Court: Would you settle for \$765,000?

Mr. Senechalle: He is quite serious, your Honor.

The Court: Just knock off that odd amount there?

Mr. Senechalle: I think that could be done.

The Court: Do you presume to enter into that agreement without specific authority from your client provided I can persuade counsel for the—

Mr. Senechalle: I would take that risk, yes, Judge.

The Court: Well, let's see what the posture of the case is.

Mr. Senechalle: Judge, as you can see, this is a single plaintiff versus a single defendant and the defendant has appeared and answered, and we are in the process of working out payment of a portion of the moneys which the defendant agrees are owed pending the outcome of the litigation. And we are in the process of doing that now.

The Court: In the process of doing what?

Mr. Senechalle: Of working out the payment of a portion of the moneys allegedly due in the complaint.

Mr. Sherman: Your Honor, Sambo's Restaurants tendered to the plaintiff certain funds as part of the termination of his employment. Those funds were returned to Sambo's. Plaintiff has now asked for those funds again, and we are willing to pay them, as we admit we owe them. And so I have sent off a letter to California to get those funds for the plaintiff.

As to the \$765,000, we have denied that we owe that money and we stand ready for trial, your Honor.

The Court: I am glad to hear that. I will set this case for trial. It appears, from the record, that the case is at issue. I will set it for trial on September 20th at 10:00 o'clock.

Mr. Sherman: Thank you, your Honor.

Mr. Senechalle: Judge, I doubt frankly, if that is a realistic trial date. We have some discovery which we need to take in the form of depositions.

The Court: The discovery was not promulgated by the United States Supreme Court to delay trials. They were placed of record to expedite the disposition of business. It is your privilege to proceed with discovery immediately after a complaint is filed.

I am here to help the Judges dispose of the business of the Court. They do not need an old Judge to continue cases. I am here to try to assist the Judges in trying cases as a so-called Senior Judge. And if your client has all this money coming, you ought to—we are dealing with a huge amount of money here, allegedly—well over a million dollars.

Mr. Senechalle: We intend to expedite it also, Judge.

The Court: So you get some proof in shape by the date indicated.

Mr. Clerk, the cause will be set for trial, as I said, on September 20th at 10:00 o'clock.

Mr. Sherman: Thank you, your Honor.

Mr. Senechalle: Thank you, your Honor.

CERTIFICATE

I, John M. Unzicker, do hereby certify that the foregoing is a true, accurate and a complete transcript of the proceedings had in the above-entitled cause before the Hon. Julius J. Hoffman, one of the Judges of said Court, in this courtroom at Chicago, Illinois, on Thursday, July 21, 1977.

/s/ John M. Unzicker
United States District Court
Northern District of Illinois

Reported by:
Gwendolyn S. Capers, CSR.

APPENDIX H

**IN THE
UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division**

JOHN D. BRAZIL,

vs.
SAMBO'S RESTAURANTS, INC.,

No. 77 C 1044

Plaintiff,

Defendant.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Hon. Julius J. Hoffman, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, September 20, 1977, at the hour of 10:00 o'clock a.m.

Appearances:

Messrs. Plunkett, Nisen, Elliott and Meier
One North LaSalle Street
Chicago, Illinois

By: Mr. Ronald Lipinski,
appeared on behalf of the plaintiff;

Messrs. Sonnenschein, Carlin, Nath and Rosenthal
8000 Sears Tower
Chicago, Illinois 60606

By: Mr. James M. Goff,
appeared on behalf of the defendant.

The Clerk: 77 C 1044, John D. Brazil v. Sambo's Restaurants, Inc., cause called for trial.

Mr. Goff: Good morning, your Honor, the defendant is ready for trial.

Mr. Lipinski: Good morning, your Honor, my name is Ronald Lipinski on behalf of the plaintiff. I would like to present a petition for a continuance of the trial date for a short period. We have some depositions scheduled for next month. We feel that—

The Court: Depositions set?

Mr. Lipinski: Yes.

Mr. Goff: I would object to this continuance, your Honor .

The Court: I will look at the motion for a continuance. This case was set two months ago—about two months ago, was it not?

The Clerk: Two months to the date, your Honor.

Mr. Goff: I was not here on that occasion, your Honor, but I understand Mr. Hirshman—

The Court: Someone from your office—

Mr. Goff: That is correct. Your Honor, at that point the plaintiff then said he had to take discovery and your Honor told him that he should accomplish it within the next two months because today was the trial date.

The Court: That is right. If there is one single thing the Chief Justice of the United States has been urging in his speeches and papers, it is the wrongful clogging of the calendars by reason of taking too much discovery—discovery that does not discover and delay in discovery.

The discovery provisions in the Federal Rules were designed to expedite the disposition of the business of the Court, not delay them. I will look at your affidavit.

In the Opinion of the Court, the document styled, "A Motion For a Continuance," does not as a matter of law state a valid ground. The motion for a continuance will be denied.

Mr. Marshal, will you bring in a selection of veniremen? I observe a jury has been demanded here.

Mr. Lipinski: Your Honor, I feel that this is not unreasonable. We got the case as a '77 case.

The Court: Let me tell you—are you Mr. Senechalle?

Mr. Lipinski: No, I am not. He is on trial on a criminal matter.

The Court: Will you identify yourself for the record?

Mr. Lipinski: I am Ronald Lipinski, L-i-p-i-n-s-k-i-.

The Court: Mr. Lipinski, I am senior Judge here. I do not know whether you know what that means. I am volunteering my services. About 10 years I could have retired at full pay. No, they do not need a man of my experience to sit up here and continue cases.

We get this sort of thing, and it is clogging our calendars, just as the Chief Justice has pointed out in various speeches and continues to do that from time to time. I am obligated to try this case. I have volunteered for this service and have continued it for a long time. I hope I will be able to do it for a long time in the future.

When we set these cases at a status call, we consult the convenience of the lawyers. We put that down for two months after that date. I think that is a reasonable setting. I will let my ruling stand.

Mr. Lipinski: Your Honor, at this point there is no way that we could proceed to trial. I know absolutely nothing about this case.

Mr. Goff: I might note, if I may for the record, your Honor, that these notices of deposition referred to in this motion were served on us yesterday afternoon.

The Court: If there is no way that you can proceed to trial the Court has no alternative other than to dismiss the case for want of prosecution. That will be the order, Mr. Clerk. Call your next one.

The Clerk: That is it, you Honor.

The Court: The Court will be in recess, Mr. Marshal, until 2:00 o'clock this afternoon.

CERTIFICATE

I, John M. Unzicker, do hereby certify that the foregoing is a true, accurate and complete transcript of the proceedings had in the above-entitled cause before the Hon. Julius J. Hoffman, one of the Judges of said Court, in his courtroom at Chicago, Illinois, on September 20, 1977.

/s/ Joan M. Unzicker
Official Court Reporter
United States District Court
Northern District of Illinois

APPENDIX I

IN THE

UNITED STATES DISTRICT COURT

Northern District Of Illinois

Eastern Division

JOHN D. BRAZIL,

Plaintiff,

vs.

SAMBO'S RESTAURANTS, INC.,

Defendant.

No. 77 C 1044

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Hon. Julius J. Hoffman, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, October 7, 1977, at the hour of 10:00 o'clock a.m.

Appearances:

Messrs. Plunkett, Nisen, Elliot and Meier
One North LaSalle Street
Chicago, Illinois

By: Mr. Robert E. Senechalle, Jr.,
appeared on behalf of the plaintiff;

Messrs. Sonnenschein, Carlin, Nath and Rosenthal
8000 Sears Towers
Chicago, Illinois 60606

By: Mr. James M. Goff,
appeared on behalf of the defendant.

The Clerk: 77 C 1044, John D. Brazil v. Sambo's Restaurants, Inc., motion to reconsider order dismissing case for want of prosecution.

Mr. Senechalle: Good morning, your Honor, my name is Robert Senechalle, I am with the firm of Plunkett, Nisen, Elliot and Meier, for the plaintiff.

Judge, this is my motion requesting that the Court reconsider its order of September 20 dismissing plaintiff's case for want of prosecution. I have filed a motion and an affidavit in support of the motion, Judge.

The Court: Do you want to be heard?

Mr. Goff: If it please the Court, we oppose the motion as we opposed the motion to continue on the 21st of September. If your Honor is disposed to take this motion under Rule 13, we will be happy to file a brief and an affidavit.

The Court: No, I think I can dispose of this motion now. Have you finished your prosecution?

Mr. Senechalle: Yes, Judge, I have. I will rely on the motion.

The Court: The plaintiff as moved pursuant to Rule 60(b) of the Court to reconsider its order of September 20, 1977 dismissing this cause for want of prosecution.

In support of the motion the plaintiff states that he had not failed to prosecute this case, but was in the process of preparing the case for trial at the time the order was entered stating that depositions were set for October of this year. The plaintiff further states, and I quote his words, counsel's words, "dismissal in this case is too harsh a sanction for a case less than five months old when plaintiff was, at the time of dismissal, in the process of getting the case ready for trial."

The plaintiff fails to point out several pertinent factors in his motion. The case was set for trial on July

21, 1977 and the plaintiff had two full months to prepare his case for trial. However, the docket reveals that plaintiff did little in the way of filing discovery materials during the time the cause was pending on the trial calendar.

Furthermore, the Court did not receive official notice that the plaintiff was not ready for trial until the case actually was called for trial. This does not indicate merely a violation of the Court's rule relating to notice, but demonstrates the lack of concern for the Court and the Clerk's office.

The Clerk of the Court had made available prospective veniremen and the Court had only this case assigned for trial on the day in question. The showing made by the plaintiff is that he was not ready for trial because he had not completed his discovery. There has not been adequate showing here.

Mr. Clerk, the motion of the plaintiff to reconsider the Court's order dismissing this case for want of prosecution will be denied.

Mr. Senechalle: Judge, might I state just one thing for the record, and that is that the day before this case was dismissed for want of prosecution on September 19 I did talk over the telephone with your Clerk, Mr. Gerwin, and informed him that I would not be ready for trial on the 20th and also informed opposing counsel so that—

The Court: Let me interrupt you, if I may, to say that we do not conduct Court business here on the telephone. All I know is that I came out here ready for trial. Veniremen were selected. Counsel for the other side was ready. We cannot operate a branch of the United States District Court that way.

Mr. Senechalle: I understand, Judge, but your Clerk telephoned me to ascertain whether or not I would be ready, and I informed him that I would not be.

The Court: Well, that is routine in doing his job. He is trying to do his best to expedite the business of the Court. The telephone calls are made routinely.

Mr. Senechalle: Thank you.

Mr. Goff: Thank you, your Honor.

CERTIFICATE

I, Joan M. Unzicker, do hereby certify that the foregoing is a true, accurate and complete transcript of the proceedings had in the above-entitled cause before the Hon. Julius J. Hoffman, one of the Judges of said Court, in his courtroom at Chicago, Illinois, on October 7, 1977

s/ Joan M. Unzicker
Official Court Reporter
United States District Court
Northern District of Illinois

APPENDIX J

TABLE C-9. U.S. DISTRICT COURTS.
TIME INTERVALS FROM FILING TO DISPOSITION OF CIVIL CASES TERMINATED, BY DISTRICT AND METHOD OF DISPOSITION.
(EXCLUDES LAND CONDEMNATION, PRISONER PETITIONS, AND DEPORTATION REVIEWS.)
INTERVALS SHOWN ARE FOR THE MEDIAN TIME AND FOR THE RANGE OF THE MIDDLE 50 PERCENT OF THE CASES.
FOR THE TWELVE MONTH PERIOD ENDED JUNE 30, 1978

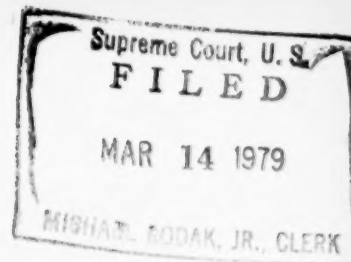
CIRCUIT AND DISTRICT	TOTAL CASES									COURT ACTION																	
	NO COURT ACTION									BEFORE PRETRIAL									DURING OR AFTER PRETRIAL								
	TIME INTERVAL IN MONTHS*			TIME INTERVAL IN MONTHS*			TIME INTERVAL IN MONTHS*			TIME INTERVAL IN MONTHS*			TIME INTERVAL IN MONTHS*			TIME INTERVAL IN MONTHS*			TIME INTERVAL IN MONTHS*			TIME INTERVAL IN MONTHS*			TIME INTERVAL IN MONTHS*		
	NUM- BER OF CASES	10 PER- CENT LESS THAN	10 PER- CENT MORE THAN	NUM- BER OF CASES	10 PER- CENT LESS THAN	10 PER- CENT MORE THAN	NUM- BER OF CASES	10 PER- CENT LESS THAN	10 PER- CENT MORE THAN	NUM- BER OF CASES	10 PER- CENT LESS THAN	10 PER- CENT MORE THAN	NUM- BER OF CASES	10 PER- CENT LESS THAN	10 PER- CENT MORE THAN	NUM- BER OF CASES	10 PER- CENT LESS THAN	10 PER- CENT MORE THAN	NUM- BER OF CASES	10 PER- CENT LESS THAN	10 PER- CENT MORE THAN	NUM- BER OF CASES	10 PER- CENT LESS THAN	10 PER- CENT MORE THAN	NUM- BER OF CASES	10 PER- CENT LESS THAN	10 PER- CENT MORE THAN
SIXTH CIRCUIT.....	10,725	2	9	30	4,030	1	6	23	3,674	2	8	24	2,152	5	17	42	961	3	15	42							
KENTUCKY EASTERN.....	442	3	21	33	252	2	9	34	330	5	22	29	30	17	37	39	30	5	24	63							
KENTUCKY WESTERN.....	300	2	15	34	251	1	9	26	371	2	12	27	152	16	28	47	24	10	25	37							
MICHIGAN EASTERN.....	2,457	2	11	32	728	1	9	17	489	2	9	19	871	8	18	40	149	11	24	45							
MICHIGAN WESTERN.....	381	2	22	47	328	1	13	33	66	2	21	33	75	23	43	59	20										
OHIO NORTHERN.....	2,440	1	6	25	1,019	1	4	16	459	1	6	16	543	4	14	39	208	3	11	33							
OHIO SOUTHERN.....	1,651	2	8	25	698	1	6	20	714	2	7	21	145	8	20	34	94	10	21	43							
TENNESSEE EASTERN.....	902	1	9	14	244	1	2	10	258	2	6	11	240	3	7	16	158	1	6	15							
TENNESSEE MIDLAND.....	482	1	9	34	294	1	6	29	190	1	6	28	14				30	2	16	129							
TENNESSEE WESTERN.....	762	2	11	26	327	2	9	22	287	2	10	23	62	10	18	48	84	8	17	39							
SEVENTH CIRCUIT.....	7,862	2	8	31	3,472	1	9	20	1,996	2	7	23	1,732	7	18	42	462	9	25	55							
ILLINOIS NORTHERN.....	4,081	1	7	26	2,526	1	8	19	997	2	7	23	570	5	16	39	198	8	24	45							
ILLINOIS EASTERN.....	426	2	9	28	218	2	6	28	80	2	6	18	96	10	17	35	32	15	24	51							
ILLINOIS SOUTHERN.....	567	2	9	38	200	1	4	25	165	2	7	29	155	6	15	44	42	12	21	52							
INDIANA NORTHERN.....	712	3	15	44	198	1	7	15	253	2	9	30	231	13	25	55	80	8	31	55							
INDIANA SOUTHERN.....	1,150	2	9	29	438	1	6	19	204	2	6	20	354	7	16	35	52	8	23	40							
WISCONSIN EASTERN.....	607	2	11	40	200	1	7	21	165	1	7	18	201	9	21	52	41	7	42	69							
WISCONSIN WESTERN.....	374	3	10	30	92	1	6	26	152	2	9	18	125	5	14	41	27	3	18	69							
EIGHTH CIRCUIT.....	5,736	2	10	32	2,742	1	7	24	1,649	2	8	24	723	10	23	44	582	6	20	43							
ARKANSAS EASTERN.....	608	2	16	34	234	1	6	25	194	2	11	29	119	17	28	48	61	19	31	46							
ARKANSAS WESTERN.....	416	2	15	34	183	2	8	25	116	2	12	28	68	10	22	45	49	6	22	38							
IOWA NORTHERN.....	282	1	9	31	120	1	7	20	68	2	7	14	42	9	19	28	22										
IOWA SOUTHERN.....	341	1	12	33	141	1	7	21	110	1	6	21	81	16	28	38	29	4	26	36							
MINNESOTA.....	1,096	2	12	39	581	2	10	34	200	2	6	24	144	12	27	52	81	11	31	45							
MISSOURI EASTERN.....	1,144	1	6	16	741	1	6	14	244	1	6	14	27	7	15	43	132	5	13	27							
MISSOURI WESTERN.....	803	2	10	30	328	1	6	20	538	2	9	24	87	7	43	43	53	3	25	46							
NEBRASKA.....	653	2	11	23	392	2	8	19	91	1	9	20	120	9	15	29	90	7	16	29							
NORTH DAKOTA.....	233	1	7	24	131	1	3	14	44	1	8	24	22				34	5	16	37							
SOUTH DAKOTA.....	230	1	15	39	124	1	11	34	62	1	14	34	15				31	8	22	35							
NINTH CIRCUIT.....	13,616	2	9	31	7,709	1	7	25	3,829	2	8	27	1,255	9	20	44	825	8	21	47							
ALASKA.....	319	1	15	34	96	1	8	27	145	1	10	30	64	8	21	42	18										
ARIZONA.....	939	1	8	34	610	1	6	25	238	2	10	29	52	12	24	52	39	17	55	62							
CALIFORNIA NORTHERN.....	2,920	2	9	26	1,774	1	6	20	749	3	9	27	196	8	16	34	201	8	20	48							
CALIFORNIA EASTERN.....	777	3	15	47	306	2	9	32	279	2	12	41	164	22	37	48	26	12	38	51							
CALIFORNIA CENTRAL.....	6,090	1	6	27	2,467	1	6	24	1,245	1	5	23	240	6	16	37	162	8	16	39							
CALIFORNIA SOUTHERN.....	664	2	9	27	383	2	7	24	209	2	8	24	59	12	43	53	59	11	19	43							
HAWAII.....	382	2	15	39	234	1	12	35	97	2	11	32	26	12	26	46	23										
IDaho.....	348	1	7	24	211	1	5	20	92	1	6	21	23				22										
MONTANA.....	391	2	12	32	159	1	7	21	81	1	10	33	120	7	14	38	49	2	13	31							
NEVADA.....	284	2	15	34	139	1	7	26	154	2	14	34	60	15	28	38	31	3	27	49							
OREGON.....	1,044	3	11	28	588	2	8	22	155	4	10	30	152	10	17	38	149	8	21	40							
WASHINGTON EASTERN.....	224	2	12	38	111	2	11	32	78	2	10	24	24				13										
WASHINGTON WESTERN.....	994	2	11	34	553	2	8	33	310	2	10	29	83	9	20	41	48	12	31	47							
GUAM.....	131	2	17	52	96	1	10	47	13				18				1										
NORTHERN MARIANAS.....	1																										
TENTH CIRCUIT.....	4,894	2	8	25	1,921	1	5	20	1,259	2	6	20	1,171	6	12	29	543	7	15	37							
COLORADO.....	1,054	2	12	29	177	1	9	17	476	1	6	23	282	9	21	32	121	7	25	41							
KANSAS.....	899	2	12	35	599	2	10	27	129	2	10	29	102	11	21	43	69	14	33	70							
NEW MEXICO.....	611	1	7	17	266	1	4	18	123	2	6	15	115	5	10	17	107	7	12	21							
OKLAHOMA NORTHERN.....	480	2	8	22	154	1	4	10	169	2	7	19	87	6	12	29	68	8	15	32							
OKLAHOMA EASTERN.....	309	1	6	14	121	1	4	9	84	1	4	10	73	3	9	18	31	8	14	23							
OKLAHOMA WESTERN.....	949	2	7	17	313	1	4	9	172	1	4	11	345	5	10	22	110	6	11	22							
UTAH.....	340	2	10	26	203	1	7	21	99	3	8	19	112	6	13	29	16										
VERMONT.....	227	1	7	16	86	1	5	12	57	1	5	12	53	6	9	15	42	5	9	15							

* TIME INTERVAL COMPUTED ONLY WHERE THERE ARE 25 OR MORE CASES.

Source: Office of Clerk, U. S. Dist. Court,
No. Dist. of Ill.

78-1250

No.



**In the
Supreme Court of the United States**

OCTOBER TERM, 1978

JOHN D. BRAZIL,

Petitioner,

vs.

SAMBO'S RESTAURANTS, INC.,

Respondent.

BRIEF IN OPPOSITION

EDWIN A. ROTHSCHILD
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No.

JOHN D. BRAZIL,

Petitioner,

vs.

SAMBO'S RESTAURANTS, INC.,

Respondent.

BRIEF IN OPPOSITION

The petition and appendices thereto fail to note that the unreported order of the court of appeals bears the stamped notation: "Unpublished Order, Not To Be Cited Per Rule 35". (App. 1, *infra.*).

Rule 35 of the Rules of the United States Court of Appeals for the Seventh Circuit (App. 2-App. 4, *infra.*) authorizes the entry of unpublished orders in appeals that present arguments which "are not of general interest or importance."

QUESTION PRESENTED FOR REVIEW

Whether, on the factual record in this case, the dismissal of plaintiff's action for want of prosecution pursuant to Rule 41(b) of the Federal Rules of Civil Procedure was an abuse of discretion.

STATEMENT OF THE CASE

Although the question presented is a factual question, petitioner's statement of the facts is neither complete nor accurate. The facts appearing in the transcripts and affidavits (Pet.App. 10a-29a) and summarized in the opinion of the court of appeals (Pet.App. 1a-5a) present a very different picture of the record.

Petitioner fails to mention, for example, that what he now calls "the discovery that remained to be completed" (Pet. 4) is discovery that had never even commenced; or that his counsel acquiesced in the trial setting which he subsequently disregarded; or that no one troubled to give advance notice either to the court or to the defendant that petitioner would not go forward on the trial date that had been specially set two months before. (Pet.App. 1a-5a). Indeed, even after dismissal and while asking for reconsideration, petitioner told the court that he would not be ready to proceed until he had completed depositions which he had not even noticed until the eve of trial.* (Pet.App. 11a-17a).

Petitioner's statement that "no discovery cutoff date was established" (Pet. 4) is incorrect; petitioner was plainly told to complete discovery before the trial date (Pet.App. 20a-21a). Moreover, there is nothing in any rule of court which makes a "final pretrial order" (Pet. 4) a prerequisite to trial.**

* Petitioner's statement that on September 20, 1977 "various depositions had been set for the following month" (Pet. 4) hardly discloses the fact that petitioner waited until the afternoon before the trial date to notice depositions to be taken *after* the trial date. (Pet. 13a, 24a).

** Under Rule 16, Fed. R. Civ. P., the use of pretrial orders is discretionary with the district court. In the Northern District of Illinois, each district judge has his own pretrial procedure; some judges, including the district judge below, do not use pretrial orders at all.

Petitioner also assumes in his statement of the case, as well as in his statement of the question presented for review, that the responsibility for the dismissal was "*solely*" that of his attorney. (Pet. 3). The record does not bear him out. The affidavits of his counsel show that petitioner was in communication with his counsel and must have been aware of the trial date as soon as it was set.* (Pet.App. 11a). They further show that petitioner himself had assumed responsibility for gathering the facts and submitting them to counsel. (ibid.). Nevertheless, petitioner failed to furnish the factual summary requested by counsel until August, 1977, the month before the trial date, and altogether failed to provide his counsel with the witnesses' statements which he had agreed to furnish. (Pet. App. 11a, 16a). Moreover, neither he nor his trial counsel appeared when the case was called for trial. (Pet.App. 2a).

The court of appeals found, *inter alia*, that petitioner's counsel "decided unilaterally that he was not going to proceed to trial on the Court's designated date"; that his conduct manifested "unqualified indifference" to his court commitment, "flagrant disregard" of the trial date and "unqualified disregard" for the Court's docket; that

* Petitioner himself recognizes that, in the absence of evidence to the contrary, it is appropriate to assign some responsibility to the client for the conduct of his attorney. In his discussion of *Link v. Wabash R. Co.*, 370 U.S. 626 (1962), petitioner states (Pet. 16):

Although the *Link* opinion does not refer to any act on the part of the plaintiff himself that influenced the court to affirm the dismissal, it would not have been unreasonable to assign some responsibility for the dismissal to the plaintiff when he had allowed his attorney to delay the disposition of the matter for over six years.

“plaintiff’s counsel had every opportunity to either prepare himself for the scheduled trial date, or make timely arrangements for the action to be continued” but “chose to do neither.” (Pet.App. 4a-6a).

After reviewing the record, the court of appeals found that petitioner “has cited *no facts* to sustain a charge of abuse of discretion on the part of the trial court.” (Pet. App. 3a) (Emphasis supplied.)

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Acknowledged the Lack of General Importance of This Case.

This Court’s Rule 19 provides that review on writ of certiorari will be granted only “where there are special and important reasons therefor.” No such reasons exist in the instant case. The court of appeals acknowledged the lack of general interest or importance when it elected under its Rule 35 not to publish its opinion. (App. 1, *infra*). Seventh Circuit Rule 35 (App. 2-App. 4, *infra*) provides for unpublished orders in appeals which

present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance. (Rule 35 ¶(c)(a)(ii)).

II. The Petition Seeks Only a Review of the Facts.

The single issue raised by the petition is whether, under the circumstances of this case, it was an abuse of discretion to dismiss the action for want of prosecution. As the court of appeals recognized, this is plainly an issue which turns solely upon an analysis of the particular facts involved: “each case must be examined with regard to its own peculiar procedural history and the situation at the time of dismissal.” (Pet.App. 3a).

This Court stated in *United States v. Johnston*, 268 U.S. 220, 227 (1925), “we do not grant a certiorari to review evidence and discuss specific facts.” A grant of certiorari is particularly inappropriate where, as here, the court of appeals concurs in the findings of fact made by the district court. As this Court has often held:

A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error. *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949) and cases cited; *Berenyi v. Immigration Service*, 385 U.S. 630, 635 (1967).

III. The Decision Below Does Not Conflict With the Decisions of Other Circuits.

Petitioner argues that the decision below conflicts with decisions of other courts of appeals to the effect that dismissal of an action for want of prosecution, when based solely upon the conduct of counsel, may be invoked only under extreme circumstances.

The supposed conflict does not exist. The factual record amply supports the conclusion that the circumstances which justify dismissal of an action for want of prosecution are present in the case at bar. The court of appeals found that there were “no facts” to sustain a charge of abuse of discretion (Pet.App. 3a) and that the actions of plaintiff’s counsel evidenced an “unqualified indifference” and “flagrant disregard” of the scheduled trial date and the Court’s docket. (Pet.App. 4a). Nor does the record exonerate petitioner himself from responsibility (see *supra*, p. 3).

The cases from other circuits cited by petitioner (Pet. 10-13) are factually inapposite. On the other hand, the case of *Jameson v. DuComb*, 275 F.2d 293 (7th Cir. 1960) to which petitioner now says he "takes no exception" (Pet. 15), is in our view and in the view of the court of appeals substantially indistinguishable from the case at bar. (See Pet.App. 5a). The *Jameson* case was less than a year old when it was dismissed; no prior continuances had been sought by plaintiff; the interval between the setting day and the trial date was only a little more than four months. As in the case at bar, the court had set aside the date for the trial of the case. Indeed, with respect to discovery, Jameson had shown more diligence than petitioner; Jameson had at least noticed depositions in advance of the trial date and had attempted to take them before trial. Nevertheless, the court affirmed the dismissal because Jameson, like petitioner, was not ready for trial and did not appear.

Finally, irrespective of the relative responsibility of petitioner and his counsel, the court of appeals noted that to excuse petitioner from the consequences of his counsel's acts would shift the burden to defendant. (Pet.App. 6a).

IV. The Decision Below is in Harmony With the Decisions of This Court.

The decision below is plainly supported by *Link v. Wabash R. Co.*, 370 U.S. 626 (1962). Although petitioner quotes at length from the dissent in *Link* and mentions that it was a four to three decision (Pet. 16-18), petitioner does not appear to be asking that *Link* be overruled. Moreover, since petitioner now approves the *Jameson* holding, he can no longer seek to distinguish *Link* on the theory that only a long history of misconduct can justify dismissal. (See Pet.App. 5a).

Petitioner now assumes that this Court in *Link* assigned "some responsibility for the dismissal" to the plaintiff for allowing his attorney to be dilatory, even though the opinion says nothing to this effect. (Pet. 16). Such an assumption, however, does not avail petitioner. As noted above (*supra*, p. 3), there is a far more substantial basis for making such an assumption in the case at bar: the affidavits of petitioner's own counsel confirm petitioner's share in the failure to prosecute the case.

Petitioner's comments on the problems of trying malpractice cases in Illinois seem to us to be completely beside the point.

CONCLUSION

It is submitted that the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX I

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

(Argued May 24, 1978)

September 11, 1978

Unpublished Order

Not To Be Cited

Per Circuit Rule 35

Before

HON. THOMAS E. FAIRCHILD, *Chief Circuit Judge*

HON. PHILIP W. TONE, *Circuit Judge*

HON. ROY W. HARPER, *Senior District Judge*

No. 77-2231

JOHN D. BRAZIL,

Plaintiff-Appellant,

vs.

SAMBO'S RESTAURANT, INC.,

Defendant-Appellee.

Appeal from the United States District Court

for the Northern District of Illinois,

Eastern Division.

No. 77 C 1044,

JULIUS J. HOFFMAN, *Senior Judge.*

ORDER

APPENDIX II

ARTICLE III. PUBLICATION RULE

Circuit Rule 35. The following rule is the Plan for Publication of Opinions of the Seventh Circuit promulgated pursuant to resolution of the Judicial Conference of the United States:

(a) Policy. It is the policy of this circuit to reduce the proliferation of published opinions.

(b) Publication. The court may dispose of an appeal by an order or by an opinion, which may be signed or per curiam. Orders shall not be published and opinions shall be published.

(1) "Published" or "publication" means:

(i) Printing the opinion as a slip opinion;

(ii) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media;

(iii) Permitting publication by legal publishing companies as they see fit; and

(iv) Unlimited citation as precedent.

(2) Unpublished orders:

(i) Shall be typewritten and reproduced by copying machines;

(ii) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and the news media, and shall be available to the public on the same basis as any other pleading in the case;

(iii) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported) and the judgment or operative words of the order, such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth;

(iv) Except to support a claim of *res judicata*, collateral estoppel or law of the case, shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose.

(c) Guidelines for Method of Disposition.

(1) Published opinions: Shall be filed in signed or per curiam form in appeals which

(i) Establish a new or change an existing rule of law;

(ii) Involve an issue of continuing public interest;

(iii) Criticize or question existing law;

(iv) Constitute a significant and non-duplicative contribution to legal literature

(A) by a historical review of law;

(B) by describing legislative history, or

(C) by resolving or creating a conflict in the law; or

(v) Reverse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order.

(2) Unpublished orders:

(i) May be filed after an oral statement of reasons has been given from the bench and may include only, or little more than, the judgment rendered in appeals which

(A) are frivolous or

(B) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where

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(aa) a controlling statute or decision determines the appeal;

(bb) issues are factual only and judgment appealed from is supported by evidence;

(cc) order appealed from is non-appealable or this court lacks jurisdiction or appellant lacks standing to sue; or

(ii) May contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which

(A) are not frivolous but

(B) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

(d) Disposition is to be by Order or Opinion.

(1) The determination to dispose of an appeal by unpublished opinion shall be made by a majority of the panel rendering the decision.

(2) The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

(3) Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for disposition of appeals as set forth in this rule.